



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 529 OF 2014

MUNSHI ZULEKHA BAHADUR.....CLAIMANT

VS

METAL CROWNS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This action is brought by Munshi Zulekha Bahadur against her former employer, Metal Crowns Limited. The claim is contained in a Statement of Claim dated 2nd May 2014 and filed in court on 6th May 2014. The Respondent filed a Response on 11th July 2014.

2. When the matter came up for hearing, the Claimant testified on her own behalf and thereafter called a former Assistant Human Resource Manager, Boaz Omori Obop. The Respondent called its Human Resource and Administration Manager, Caroline Moraa Asuma. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant states that she was employed by the Respondent on 18th March 2010 in the position of Assistant Imports and Exports Manager. She earned a monthly salary of Kshs. 139,500 which was later increased to Kshs. 195,561.

4. In December 2011, the Claimant's employment was terminated on account of unsatisfactory job performance. The Claimant explains that she had made an erroneous declaration of tariff on duty free imports. She initiated follow up and the error was rectified and a refund of Kshs. 867,014 was made to the Respondent. The Claimant terms this as a normal office error.

5. The Claimant avers that she was forced to sign a discharge and clearance certificate. Her case is that the termination of her employment was unlawful and unfair. She now claims the following:

- a) 12 months' salary in lieu of notice.....Kshs. 2,346,732
- b) 12 months' salary in compensation.....2,346,732
- c) Salary arrears from 19th December 2013
- d) Accumulated leave for the period the Claimant has been out of employment
- e) Severance pay @ 15 days per year.....195,561
- f) Medical cover for 12 months for the Claimant.....2,346,732
- g) Medical cover for the Claimant's dependants.....7,040,196
- h) Damages for wrongful and unlawful termination
- i) Costs plus interest

The Respondent's Case

6. In its Response dated 10th July 2014 and filed in court on 11th July 2014, the Respondent accuses the Claimant of unsatisfactory performance, by making potentially costly mistakes. The Respondent admits that the Claimant pursued refund of the duty erroneously paid, though after a lot of pressure. The Respondent adds that the Claimant was frequently warned of wanting performance but she failed to improve. The Respondent therefore maintains that the Claimant's employment was lawfully terminated.

7. The Respondent denies the Claimant's averment that she was subjected to pressure to sign a discharge and clearance certificate. The Respondent submits that the Claimant was paid all her dues and she has no valid claim.

Findings and Determination

8. There are two issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

9. The termination of the Claimant's letter was communicated by letter dated 11th January 2012 stating as follows:

"Re: Termination of Employment

This is to inform you that the management has terminated your services with effect from 11th January 2012 due to unsatisfactory job performance.

Your final dues shall be calculated and paid to you as follows:

- 1. Salary up-to and including 11th Jan 2012*
- 2. Outstanding leave days (14.50 days)*
- 3. One month pay in lieu of notice*
- 4. Less any company liability.*

You are requested to clear with all departments before liaising with the Accounts Department for your final dues.

Yours faithfully

For Metal Crowns Ltd

(Signed)

Stephen Murithi

Human Resource Manager

10. From this letter, it is evident that the Claimant's employment was terminated on account of poor performance. This is one of the grounds allowed in law but there is a procedure to be followed. In the final submissions filed on behalf of the Claimant on 20th April 2018, reference was made to the decision in ***Kenya Science Research International Technical and Allied Workers Union (KSRTAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No 273 of 2010)*** where my brother, **Rika J** held the following:

"Once poor performance of an employee is noted, the proper procedure is to point out the shortcomings to the employee and give them opportunity to improve over a reasonable length of time."

11. In ***Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR*** this Court held that termination of employment on account of poor performance must be preceded by a participatory performance appraisal. This holding accords with the procedural fairness requirements in Section 41 of the Employment Act.

12. The Court did not find evidence of any issues of poor performance having been raised with the Claimant prior to the termination of her employment. Moreover, there was no evidence of loss to the Respondent since the sum of Kshs. 867,014 erroneously paid to the Kenya Revenue Authority was fully restored.

13. Overall, the Court finds that the Respondent failed to establish a valid reason for termination of the Claimant's employment as required under Section 43 of the Employment Act, 2007. The Court further finds that in effecting the termination, the Respondent ignored the

procedural fairness requirements set out under Section 41 of the Act. The ensuing termination was therefore substantively and procedurally unfair and the Claimant is entitled to compensation.

14. The Respondent made a big deal out of a discharge and clearance certificate signed by the Claimant. In *Simon Muguku Gichingi v Taifa SACCO Limited [2012] eKLR* this Court held that a discharge executed by an employee does not absolve the employer from its legal obligations to the employee. This remains good law and I have no reason to depart from it.

Remedies

15. In light of the foregoing findings, I award the Claimant four (4) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service alongside the Respondent's conduct in the termination transaction.

16. From the evidence on record, the Claimant was paid notice pay in accordance with the law and her contract of employment. The claim thereon is therefore without basis and is dismissed. The claims for salary arrears, accumulated leave and medical cover are anticipatory in nature and not sustainable. No basis was laid for the claim for severance pay which also fails and is dismissed.

17. In the end, I enter judgment in favour of the Claimant in the sum of Kshs. 782,244 being four (4) months' salary in compensation.

18. This amount will attract interest at court rates from the date of delivery of judgment until payment in full.

19. The Claimant will have the costs of the case.

20. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JULY 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Omondi for the Claimant

Mr. Wanjohi for the Respondent